

Bankruptcy and the Small Business
Reorganization and Haven Acts:
New Options for Individual and Small
Business Debtors: Part 2

Panelists



Gary Rudolph, Esq.

Gary Rudolph is a shareholder attorney at Sullivan Hill. Mr. Rudolph practices in the area of bankruptcy and other insolvency problems, representing trustees, creditors and debtors in commercial bankruptcies.

Mr. Rudolph representation includes corporate Chapter 7 debtors, Chapter 11 debtors-in-possession, and creditors. Mr. Rudolph serves on the Insolvency Law Committee (ILC) of the Business Law Section of the California Lawyers Association as well as the San Diego County Bar Association's Bankruptcy Law Section.



Ajay Gupta, Esq.

Ajay Gupta is the founding partner of Gupta Evans and Associates, PC. Ajay Gupta has been practicing in the area of bankruptcy since 2005 and is one of the few certified bankruptcy specialist in San Diego County. Mr. Gupta represents both debtors and creditors in state and federal bankruptcy court on a host of matters from secured transactions, to landlord-tenant disputes, to complex bankruptcy matters.



Kristin Mihelic, Esq.

Kristin Mihelic is a bankruptcy attorney with over 20 years experience with the U.S. Trustee's Office and in private practice representing creditors, committees and debtors. She serves as an adjunct professor at University of San Diego School of Law and has also taught at Cal Western School of Law, Rutgers University School of Law, and John Marshall.

Ms. Mihelic serves as the MCLE coordinator for the San Diego Bankruptcy Forum and the International Womens Insolvency and Restructuring Confederation Southern California Network. She is an active member of the California Lawyers Association Insolvency Law Committee.



Kit James Gardner, Esq.

Kit J. Gardner has practiced law in California for more than 25 years. His practice emphasizes bankruptcy law, business law, and civil litigation. Mr. Gardner has represented Chapter 11 debtors, creditors, and trustees in numerous bankruptcy cases. He has also represented businesses of all sizes in general civil litigation, including some of the nation's largest financial institutions.

Mr. Gardner is currently serving a three-year term on the Insolvency Law Committee ("ILC") of the Business Law Section of the California Lawyers Association.



Diane Gibson, Esq.

Diane graduated from USD School of Law and has practiced in the San Diego legal community for over 30 years. She is certified by the State Bar of California as a specialist in bankruptcy and has helped many individual and business Chapter 11 Debtors achieve confirmation of their Chapter 11 Plans.

Diane handles all aspects of bankruptcy representation, including adversary proceedings, relief from stay motions and preference actions.

Primer on Chapter 11

- ▶ Duties of the Debtor in Possession
- ▶ Duties of Debtor's counsel
- ▶ Plan Confirmation

Quick Review: Part I of the Program

- ▶ Subchapter V is still a Chapter 11
- ▶ Consensual vs. Non-Consensual Plans
- ▶ The Role of the Subchapter V Trustee
- ▶ The Subchapter V Plan
- ▶ Plan Performance and Administration

Paycheck Protection Plan Flexibility Act of 2020

- ▶ Maturity date extended from 2 to 5 years
- ▶ Effective date -applies to prior approved and subsequent loans
- ▶ Period covered extended from 6/30/20 to 12/31/20
- ▶ Origination of covered loan extended from 8 to 24 weeks after origination or 12/31/20
- ▶ Interest rate at 1% remains the same

Additions to PPP (part. 1 of 3)

(7) EXEMPTION BASED ON EMPLOYEE AVAILABILITY.—During the period beginning on February 15, 2020, and ending on December 31, 2020, the amount of loan forgiveness under this section shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith—

“(A) is able to document— “(i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and “(ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or

“(B) is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Additions to PPP (part 2 of 3)

“(8) LIMITATION ON FORGIVENESS.—To receive loan forgiveness under this section, an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs, and may use up to 40 percent of such amount for any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation), any payment on any covered rent obligation, or any covered utility payment.”; and (3) by adding at the end the following new subsection:

“(l) APPLICATION TO CERTAIN ELIGIBLE RECIPIENTS.—An eligible recipient that received a covered loan before the date of enactment of this subsection may elect for the covered period applicable to such covered loan to end on the date that is 8 weeks after the date of the origination of such covered loan.”.

(c) EXTENSION OF DEFERRAL PERIOD.—Section 7(a)(36)(M) of the Small Business Act (15 U.S.C. 636(a)(36)(M)) is amended—

(1) in clause (ii)(II), by striking “for a period of not less months, including payment of principal, interest, and fees, and not more than 1 year.” and inserting the following: “, including payment of principal, interest, and fees, until the date on which the amount of forgiveness determined under section 1106 of the CARES Act is remitted to the lender.”;

Additions to PPP (part 3 of 3)

(2) in clause (iii), by striking “for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year.” and inserting the following: “, including payment of principal, interest, and fees, until the date on which the amount of forgiveness determined under section 1106 of the CARES Act is remitted to the lender.”; and

(3) by adding at the end the following new clause:

“(v) **RULE OF CONSTRUCTION.**—If an eligible recipient fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period defined in section 1106(a) of the CARES Act, such eligible recipient shall make payments of principal, interest, and fees on such covered loan beginning on the day that is not earlier than the date that is 10 months after the last day of such covered period.”.

(d) **EFFECTIVE DATE; APPLICABILITY.**—The amendments made by this section shall be effective as if included in the CARES Act (Public Law 116-136) and shall apply to any loan made pursuant to section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) or section 1109 of the CARES Act.

How the HAVEN Act Impacts Bankruptcy Cases

- ▶ The Honoring American Veterans in Extreme Need Act of 2019 (the “HAVEN Act”) was signed into law on August 23, 2019 and went into effect immediately.
- ▶ For purposes of the Means Test, the HAVEN Act excludes the following types of military and U.S. Veteran payments from the Currently Monthly Income (CMI) calculation:
 - ▶ Disability (permanent and temporary) and death benefits;
 - ▶ Monthly compensation for catastrophic injuries or illnesses;
 - ▶ Any combat-related special compensation;
 - ▶ Disability severance pay;
 - ▶ Any payments to a survivor in connection with the death of a member of the uniformed services;
 - ▶ Disability-related military retired pay
- ▶ Practical Implications
 - ▶ Do not include the above payments on page 2 of official Form 122 A-1, paragraph 9 (See next slide)

How the HAVEN Act Impacts Bankruptcy Cases (D)

Debtor 1 _____ Case number (if known) _____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
8. Unemployment compensation Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: For you \$ <u>0.00</u> For your spouse \$ _____	\$ <u>0.00</u>	\$ _____

9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act. Also, except as stated in the next sentence, do not include any compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If you received any retired pay paid under chapter 61 of title 10, then include that pay only to the extent that it does not exceed the amount of retired pay to which you would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title. \$ <u>0.00</u>	\$ <u>0.00</u>
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10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act; payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism; or compensation, pension, pay, annuity, or allowance paid by the United States Government in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services. If necessary, list other sources on a separate page and put the total below. GI Bill \$ <u>303.56</u> \$ <u>0.00</u> Total amounts from separate pages, if any. + \$ <u>0.00</u>	\$ <u>303.56</u>	\$ _____
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11. Calculate your total current monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.

\$ 4,012.90 + \$ _____ = \$ 4,012.90

Total current monthly income

RETIREE ACCOUNT STATEMENT					
STATEMENT EFFECTIVE DATE APR 20, 2016		NEW PAY DUE AS OF APR 29, 2016		SSN *****	
PLEASE REMEMBER TO NOTIFY DFAS IF YOUR ADDRESS CHANGES				DFAS-CL POINTS OF CONTACT	
JSM FALLBROOK CA 92028-2888				DEFENSE FINANCE AND ACCOUNTING SERVICE US MILITARY RETIREMENT PAY PO BOX 7130 LONDON KY 40742-7130	
				COMMERCIAL (216) 522-5955 TOLL FREE 1-800-321-1080 TOLL FREE FAX 1-800-469-6559	
myPay https://myPay.dfas.mil					
PAY ITEM DESCRIPTION					
ITEM	OLD	NEW	ITEM	OLD	NEW
GROSS PAY	.00	2,002.00	GARNISHMENT DED	.00	69.95
VA WAIVER	.00	1,840.48			
SBP COSTS	.00	21.62			
TAXABLE INCOME	.00	139.90			
NET PAY			.00	69.95	
PAYMENT ADDRESS			YEAR TO DATE SUMMARY (FOR INFORMATION ONLY)		
DIRECT DEPOSIT			TAXABLE INCOME:		559.60
			FEDERAL INCOME TAX WITHHELD:		.00
TAXES					
FEDERAL WITHHOLDING STATUS:			SINGLE		
TOTAL EXEMPTIONS:			00		

Exempt from
CMI calculation

Discussion Points

- ▶ The Subchapter V Plan
 - ▶ Plan Requirements (1190(1) & most provisions of 1129(a))
 - ▶ A brief history of the business operations of the debtor;
 - ▶ A liquidation analysis; and
 - ▶ Projections with respect to the ability of the debtor to make payments under the proposed plan of reorganization.
 - ▶ Conversion, the Trustee's role and the best interests of the creditors.
 - ▶ Cramdown of non-purchase money lenders on primary residence possible for individual cases if loan was “used primarily in connection with the small business of the debtor”. (1190(3))
- ▶ No absolute priority rule—how will unsecured creditors be protected?
 - ▶ Liquidation test discussion
 - ▶ The determination of disposable income discussion
 - ▶ It's not clear other than equity and fairness and the liquidation test what distinguishes a 3 year plan from a 5 year plan.
 - ▶ Benefits of Consensual vs. Non-consensual Plans

Hypothetical:

What if the business owner has missed three lease payments and, after going in circles and trying to be patient, the landlord has finally had to issue a 3-day notice and the UD has been filed?

- ▶ Understanding commercial Lease Termination in California and the potential for lease Reinstatement (In re: Windmill Farms; CCP 1174 and 1179)
 - ▶ 1174: lease is terminated at least by the time of the UD, but probably the expiration of the 3 day notice (assuming valid 3 day notice + termination clause in the lease)
 - ▶ 1179: The right to equitable reinstatement “full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.
 - ▶ <https://socal.law/how-commercial-residential-tenants-can-save-their-lease-post-covid-19/>
- ▶ Re-primer on Lease Assumption of Commercial Leases
 - ▶ Lease Assumption / Rejection (120 days with limited rights of extension)
 - ▶ Assumption requires full payment of post petition payments that came due.
 - ▶ Lease Assumption / Cure vs. Lease Rejection
 - ▶ In order to assume the lease, the debtor must cure any defaults or provide assurance that it will promptly do so. §365(b)(1)(A).
- ▶ Working with your landlord to discharge unsecured loans to save the business
- ▶ Personal Guarantees

Hypothetical:

What if struggling restaurant due to Covid and they've only returned to 50% capacity due to capacity restrictions? How does that affect feasibility and payments?

- ▶ 1191(d) Disposable income =
 - ▶ income that is received by the debtor and that is not reasonably necessary to be expended—
 - ▶ (1)for—
 - ▶ (A)the maintenance or support of the debtor or a dependent of the debtor; or
 - ▶ (B)a domestic support obligation that first becomes payable after the date of the filing of the petition; or
 - ▶ (2)for the payment of expenditures necessary for the continuation, preservation, or operation of the business of the debtor.
- ▶ Still, must evaluate feasibility of the plan of reorganization (e.g. ability to pay operating expenses going forward and make all plan payments), survive liquidation analysis, and be “fair and equitable” to secured creditors (which is different than the “fair and equitable” formula for unsecured creditors defined above)

Other Considerations:

► Checklist - Debtor Side

- ❑ Lease Review / Review loan documents
- ❑ Advise insiders to seek independent counsel for taxes and other business related matters.
- ❑ Contact critical vendors and customers
- ❑ Negotiate rent reduction or holiday with your lessor(s)
- ❑ Work with your bank toward forbearance
- ❑ Evaluate Sale Options vs. restructuring options vs. dissolution/liquidation

Other Considerations

▶ Checklist - Landlord

- ❑ Understand lease default provisions
- ❑ Understand the market for your property post Covid-19
- ❑ Understand your client's rights in Bankruptcy
- ❑ Evaluate the strength of personal guarantees

▶ Checklist - Lenders

- ❑ Have processes in place for loan modification and workouts
- ❑ Be prepared to contest the Debtor's cramdown of your claim e.g. interest rate to be applied (*Till v. SCS Credit Corp.*, 541 U.S. 465 (2004) is not necessarily applicable)
- ❑ Evaluate personal guarantees and strength of collateral
- ❑ Evaluate performance bonds / insurance options

Other Considerations (Time Permitting)

- ▶ How do you value small businesses for the purpose of the liquidation test? (Going concern vs. liquidation vs. market analysis, business valuation expert?)
- ▶ How do you get paid in Subchapter V? How do administrative claims get paid?
- ▶ How do you evaluate a case (cash collateral)?
 - ▶ Individual Cases vs. Business Cases?
 - ▶ What kind of retainer should you take?